88-1113

No. _____

Supreme Court, U.S.
FILED
DEC 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

MIKULEC INDUSTRIES, INC.,

Petitioner,

vs.

ICI AMERICAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

ARNOLD WEISS, Esq.
Designated Counsel of Record
Attorney for Petitioner
1400 Main Place Tower
Buffalo, New York 14202
Telephone: (716) 852-7587

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented for Review

1. Can contractor flout "Buy American" Act [41 USC 10a-c], and USAF MilSpec Test Standards, by supplying *imported* and *untested* Halon 1211 for USAF fire extinguisher contract?

2. Can MILSPEC-B-38741 (USAF) *typographical* error which set Halon moisture limit at 200 ppm, instead of 20 ppm, *knowingly* be used by ICI to supply defective Halon for the United States Air Force?

3. Did Second Circuit—contradict its prior decisions on the standard of "direct proof" in product defect cases—and depart from "Normal course of justice", in holding that proof of excess moisture in ICI Halon—from: actual corrosion and rust taken from ICI *sealed* Tanks; ICI Lab Book entries of excess moisture; ICI Officials' admissions; ICI failure to make MilSpec Moisture Tests; and impartial Air Force and other witnesses—was *not* "direct proof"; and, in imposing the impossible burden of eliminating "every other *possible* source" of moisture?

4. Did FRCP 26 & 27 entitle Plaintiff to survive directed verdict motion, where Discovery responses *suppressed* damaging ICI Lab Book data of excess water, and ICI letter disclosing serious MilSpec error?

5. Is Sherman Act claim for abuse of 100% monopoly of Halon 1211 "waived" by deferring it in a FRCP 42(b) bifurcation?

6. Did "Speedy Trial" Act [18 USC 3161], and criminal trial pressure, cause denial of due process in this civil action?

List of Parties

ICI Americas, Inc. ("ICI"), a subsidiary of Imperial Chemicals International, PLC, the world's largest chemical firm, and a major supplier to the US Defense Department, was Defendant in the District Court, and Appellee in the Court of Appeals.

Mikulec Industries, Inc. ("Mikulec"), Plaintiff in the District Court, and Appellant in the Court of Appeals, is in Chapter 11 Reorganization (USBC:WDNY, 83-12354-M) as a result of ICI's wrongful actions (App. 9a, 12a).

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Appendices to Petition	v
Table of Authorities	vi
Opinions Below	1
Jurisdictional Statement	2
Constitutional Provisions, Statutes, Rules and MilSpecs Involved	3
Statement of the Case	5
Summary of the "Direct Proof" of ICI's perfidious actions	5
The Indisputable "Smoking Guns"	9
ICI's Unanswerable "Omissions"	10
ICI's Fault was Corroborated by Independent Witnesses	12
The Basis for Federal Jurisdiction in the District Court	13
Reasons for Allowance of Writ of Certiorari	14
I. The Second Circuit ignored its prior decisions on "Direct Proof" in defective product cases	14
II. ICI was allowed to flout the "Buy American" Act, the USAF MilSpecs and Plaintiff's contract	16

Page

A. The "Buy American" Act 16
B. The MilSpec Test Method 16
C. The MilSpec Tank Inspection Requirement 18
D. ICI's "Certificates of Analysis" and Bills of Lading were fraudulent 19

III. Defendant was allowed to benefit from its suppression of damaging evidence on discovery 20

A. Suppression of the MilSpec Error 20
B. Suppression of Moisture and Lab Book Data 21
C. Defendant was allowed to benefit from its suppression 23
D. Plaintiff should have received a Procedural benefit 23

IV. Sherman Act claim for abusing 100% monopoly could not be "waived" by deferring it in an FRCP 42(b) bifurcation 24

V. Petitioner was denied a "due process" trial by jury 26

Conclusion 29

Page

TABLE OF APPENDICES TO PETITION.

Appendix A—Order of the United States Court of Appeals for the Second Circuit, dated and filed October 3, 1988 (unreported), denying rehearing .. 1a

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit, dated and filed July 6, 1988, affirming the District Court's dismissal of the action..... 3a

Appendix C—Order and Final Judgment of the United States District Court for the Western District of New York, per Elfvin, J., dated and entered December 31, 1987 (unreported), dismissing the action..... 7a

Appendix D—Order and Opinion of the United States District Court for the Western District of New York, per Elfvin, J., dated and filed December 30, 1986, directing a verdict of dismissal..... 8a

Appendix E—Text of Constitution, Statutes, Rules and MilSpec Provisions Involved..... 15a

Appendix F—Excerpts of Trial Exhibit 30a

Appendix G—Excerpts of Trial Testimony 31a

Page

TABLE OF AUTHORITIES.

Cases:

Ajax Hardware Mfg. Co. v. Industrial Plants Corp., (CA2; 1977) 569 F2d 181 14,15
Antilles S.S. Co. v. Members of American Hull Ins. Syn., (CA 2; 1984) 773 F2d 195 15
Arnold v. Eastern Airlines (Ca 4, in Banc, 1983) 712 F2d 899, cert. den. (1984) 464 US 1040 25
Blue Ribbon Ice Cream Co. v. Banner Roofing Co., (AD 2; 1963) 18 AD2d 1074, 239 NYS2d 574 15
Franklin Music Co. v. American Broadcasting Co. (CA 2, 1979) 616 F2d 528 25
Garber v. Randell (CA2, 1973) 477 F2d 711 25
Huddell v. Levin, (CA 3; 1976) 537 F2d 726 14
Lyon v. Mutual Benefit H & A Ass., (1939) 305 US 484, reh. den. 306 US 667 14
Meyers v. Selznick Company, (CA2; 1966) 373 F2d 218 14,15
Necaise v. Chrysler Corp., (CA 5; 1964) 335 F2d 562 15
Painton & Co. v. Bourns, Inc., (CA 2; 1971) 442 F2d 216 15
Simler v. Conner, (1963) 372 US 221 14
Simpson Timber Co. v. Palmberg Const. Co. (CA9 : 1967) 377 F2d 380 23
Sparf v. U.S., (1895) 156 US 99 14
Stewart v. Ford Motor, (CA:DC; 1977) 553 F2d 130 14,15
Treat Mfg. Co. v. Standard Steel Co., (1895) 157 US 674 14
U.S. ex rel. Roman v. Schlesinger (DC NY : 1975) 404 F.Supp. 77 23

Page

Westinghouse Electric Corp. v. Garrett Corp. (DC Md: 1977) 437 F.Supp. 1301, aff'd (CA 4 : 1978) 601 F2d 155 23
Wichmann v. United Disposal, Inc. (CA 8, 1977) 553 F2d 1104 25

Statutes:

Buy American Act, 41 USC 10a-c 3,16,26
Sherman Anti-Trust Act, §§1 and 2 3,13
Speedy Trial Act, 18 USC §3161, *et seq.* 26
28 USCA:
§1861, *et seq.* 14,26
§1254(1) 2
§2106 2
§2111 2

Rules:

Federal Rules of Civil Procedure:

Rule 15 25
Rule 26, Subd. (d)(1) 3
Rule 26, Subd. (g) 3
Rule 27, Subd. (b) 3
Rule 27, Subd. (b) ¶2 4
Rule 38(a) 14
Rule 42, Subd. (b) 4,24,25

Federal Rules of Evidence:

Rule 801, Subd. (d) 4
Rule 801, Subd. (d) ¶2 4
Rule 803, ¶6 4

Page

Constitution:

Amendment Article V 4
Amendment Article VII 4,26
Amendment Article XIV, Section 1 4

MilSpecs:

MilSpec-B-38741 3,16
Amendment 1 3
Amendment 2 3

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

MIKULEC INDUSTRIES, INC.,

Petitioner,

vs.

ICI AMERICAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no official or unofficial reports of any Opinions delivered in the Courts below.

The Opinion and Judgment of the District Court, the Opinion and Order of Affirmance of the Court of Appeals for the Second Circuit, and the Order of said Court denying re-hearing, are printed as Appendices A through D, and are listed under the Table of Appendices at page v, *supra.*

JURISDICTIONAL STATEMENT

The grounds on which the jurisdiction of this Court is invoked are as follows:

A. The Judgment sought to be reviewed is that of the United States Court of Appeals for the Second Circuit, dated July 6, 1988 affirming the Order and Judgment of the United States District Court for the Western District of New York entered December 31, 1987 which dismissed the action.

B. An Order of the United States Court of Appeals for the Second Circuit denying Rehearing was entered on October 3, 1988.

C. The Court of Appeals' mandate was issued on November 3, 1988 and was entered in the District Court on November 14, 1988.

D. Jurisdiction is conferred on this Court to review the Judgment in question by Certiorari by 28 USCA 1254(1), 2106 & 2111.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND MILSPECS INVOLVED

The constitutional provisions, statutes, rules and MilSpecs involved are lengthy, and are reproduced in full at Appendix E, and cited here by reference:

I. *US Military Specifications Involved:*

MilSpec-B-38741 (USAF) dated July 30, 1965, Sections 1, 2, 3, 4, 5 and 6 (Ex. P-18A);

Amendment 1 dated September 25, 1984 to MilSpec-B-38741 (USAF), amending Sections 2.2, 5.1.1 and 6.2 (Ex. P-18A);

Amendment 2 dated April 4, 1984 to MilSpec-B-38741 (USAF), amending Sections 2.2 and 4.4.8.

II. *Statutes Involved:*

Buy American Act, 41 USC, §§10(a) and 10(c);

Sherman Anti-Trust Act, 15 USCA §1 & 2;

§1, "Restraints of Trade . . .";

§2, "Monopolizing Trade . . .".

III. *Federal Rules of Civil Procedure Involved:*

Rule 26, "General Provisions Governing Discovery";

Subd. (d)(1), "Supplementation of Responses";

Subd. (g), "Signing of Discovery Requests, Responses and Objections";

Rule 27, "Failure to Make or Cooperate in Discovery: Sanctions";

Subd. (b), "Failure to Comply with Order";

¶2, "Sanctions by Court in Which Action is Pending".

Rule 42, "Consolidation; Separate Trials";

Subd. (b), "Separate Trials".

IV. *Federal Rules of Evidence:*

Rule 801, "Definitions";

Subd. (d), "Statements Which are not Hearsay";

¶2, "Admissions by Party-Opponent";

Rule 803, "Hearsay Exceptions . . .";

¶6, "Records of Regularly Conducted Activity".

V. *Constitutional Provisions:*

Amended Article V ("Due Process");

Amended Article VII ("Trial by Jury");

Amended Article XIV, Section 1 ("Due Process").

Statement of the Case

Summary of the "Direct Proof" of ICI's perfidious actions

The irrebuttable proof in this Case—the overwhelming and unanswerable evidence of ICI's perfidy in seeking to evade the MilSpecs, and the "Buy American" Act, by using deception, and a "psuedo-monopoly", to "force" the purchase of its corrosive, untested and imported Halon 1211—"cries out" that there has been a "gross departure from the normal course of judicial proceedings." No plaintiff's case *ever* had more "direct", unanswerable and irrebuttable proof!

ICI abused its 100% monopoly of the "USAF[1] Military market" for domestic ("Made in USA") Halon 1211, by *falsely* holding itself out as the *sole* source of high quality, low-ppm[2], "Made in USA", Halon 1211 which: could satisfy the "Buy American" Act; was fully tested in accordance with the USAF MilSpec's Test Method; and, was certified to conform to the MilSpecs 20 ppm[3] maximum moisture limit.

These ICI claims were wholly false! ICI had only an apparent, or "pseudo" monopoly".[4] Most of the Halon ICI supplied to Mikulec was secretly imported from its

---

[1] The United States Air Force (sometimes "USAF").

[2] "ppm" represents "Parts per Million" by weight.

[3] The MilSpecs, prior to the April 9, 1984 correction (Exhibit P-18B, Appendix E, App. 25a), erroneously allowed 200 ppm (0.02%) of moisture. This was *10 times* the actual 20 ppm (0.002%) moisture limit, and, 130 ppm greater than the 70 ppm corrosion-causing saturation point (Appendix E, App. 29a).

[4] Petitioner did not discover ICI's clandestine use of untested, imported Halon 1211, until the end of plaintiff's case, when ICI accidentally revealed that the Moisture Book, Ex. P-46, which it had furnished to Mikulec during discovery, was a fabrication—a "phantom" book—which had been specially prepared to deceive Petitioner.

U.K.[5] Plant, then clandestinely dumped into its USA bulk storage Tanks, and falsely certified to be "domestic", so as to comply with the "Buy American" Act in Mikulec's contract.

ICI used this ploy to "force" Mikulec, and other US Military contractors to buy its inferior, untested, corrosive and more expensive imported Halon 1211—under the false impression that ICI was the sole "domestic" source of USA-made Halon 1211, and that no other Halon could be used.

While ICI also mixed some "domestic" Halon 1211 in its bulk storage Tanks, this, as its Plant Manager admitted, was its inferior 200 ppm moisture content, untested, "Military" grade, which was 10 times the MilSpecs 20 ppm moisture limit. ICI's Lab Books (Exs. P-36 & P-37), and its "actual" Moisture Books (Exs. P-38 & P-39) show that ICI's USA-manufactured Halon had up to 1,375 ppm of moisture[6]—whereas, 70 ppm causes corrosion which can be deadly to fire extinguishers—and to all those who rely on them.

ICI did not test this Halon by the MilSpec Test Method, as required by Mikulec's Purchase Order. When the Air Force reported the corrosion problem, ICI refused to furnish Mikulec with its tests methods, or with any actual "Certificates of Chemical Analysis" of the Halon, as required by Mikulec's contract. Instead, ICI would only assure Mikulec that its Halon "conformed" to the MilSpecs moisture limit—whatever that

---

[5] ICI's actual Moisture Books, Exs. P-38 & P-39, revealed for the first time ICI's use of "high ppm" imported "U.K." Halon—which fact ICI had denied when asked by Mikulec on its depositions of ICI's Officials.

[6] After correcting its 125 ppm moisture reading by the 10.87 correlation factor, which ICI calibrated to compare the ICI proprietary test method with the MilSpec Test Method (See: "Rosetta Stone Lab Book page, Ex. P-36A; Appendix F, App. 30a).

meant—and led Mikulec on a "wild goose chase". Mikulec sought everywhere for the source of the corrosion, including: the Air Force's handling of the extinguishers, and Mikulec's own valve test, air compressor, pump, metal parts, nitrogen, etc.—in all, 41 different possible sources of the corrosion (Ex. P-35). All the while ICI was assuring Mikulec that its Halon could not possibly be the problem.

ICI knew it was guilty of not following the MilSpecs Test Methods and "Lot Acceptance" and "Lot Rejection" provisions. Great Lakes Chemical's Manager testified that ICI tried to use political pressure with the Air Force to have the MilSpecs amended to eliminate these safeguards, and asked Great Lakes to help. Great Lakes, he testified, deemed the request improper, and refused to cooperate with ICI's plan.

These MilSpec safeguards—so distasteful to ICI that it IGNORED them—would have prevented the corrosion problem which Mikulec—and the US Air Force—suffered. The safeguards, which ICI admittedly NEVER followed, were:

—An inspection of the *inside* of *each* of ICI's recycled shipping Tanks, after return, and immediately BEFORE being filling with Halon, to insure that the Tank is free of "corrosion", and, fit for filling with Halon, and shipment and storage (MilSpec ¶5.1.1).

—A specific USAF MilSpec Test Method for measuring the level of moisture in Halon 1211, known as the Karl Fischer Test, and substituted its own unauthorized test—which it knew gave its Halon significantly lower moisture readings (Appendix F, App. 30a).

—Testing according to MilSpec Test Method, of the Halon 1211 in 11% of ICI's Tanks (2 Tanks out of *each* "Shipping Lot" of 22), AFTER they had been filled with Halon, to insure that the moisture level in the Halon was below 20 ppm (MilSpec ¶4.2-4).

—"Lot Acceptance" and "Lot Rejection" procedures, which provided for Rejection of the entire Lot of 22 Tanks, if the Halon of *either* of the 2 Tanks of any Lot tested over 20 ppm of moisture (MilSpec ¶4.2-4, & 4.8).

ICI thus wrongfully abused and misused its apparent, 100% monopoly position to "deceive" Mikulec into believing that Mikulec had no other available USAF source. It thus used its "pseudo-monopoly" power to "force" Mikulec to buy its contaminated, imported Halon, disguised as "domestic" Halon, and to prevent Mikulec from buying available, cheaper, better and purer Halon 1211 with *only* 3 ppm of moisture—which openly was imported from France and Japan by Great Lakes Chemical and RhonePoulenc (Ex. D-81; Jt. App., p. 283). Their Halon fully met the MilSpecs, but not the "Buy American" Act.

Mikulec used this high quality 3 ppm imported Halon for its "commercial" extinguishers. It could not use it for its USAF contract due to "Buy American" Act—so long as ICI continued to abuse its "pseudo-monopoly", and FALSELY claim that it had available a 100% USA-made Halon 1211 product, which met the MilSpec Test standards.

Thus, ICI—contrary to U.S. security and economic interest—forced the purchase of its more expensive inferior, untested and "non-MilSpec" Halon, which it secretly imported from Britain, by "Military" customers like Mikulec, on the false claim that it's Made in the USA, and was tested by the MilSpec Test Method, and complied therewith.

ICI apparently was not bothered by the fact that the Halon was intended for use in Mikulec's fire extinguishers, which were designed and intended to protect USAF Jet aircraft, Pilots and Personnel, during "hot refueling" rapid turnarounds, under severe combat conditions.

The Indisputable "Smoking Guns"

Contrary to the Second Circuit's assertion that there is "no direct proof" of ICI's negligence, the Record is replete with indisputable "smoking guns" which provided overwhelming "direct proof" that the Halon 1211 which ICI supplied for Petitioner's USAF contract, was, and that ICI *knew* it to be, highly corrosive:

A. McDill US Air Force Base found water and corrosion in ICI Tanks, which it had received *directly* from ICI, and which had never been in Mikulec's Plant (One of these Tanks was produced at the trial.)

B. Rust and corrosion from one of these McDill AFB Tanks was produced at the trial. It was weighed and chemically converted to water, which matched ICI's excess moisture levels.

C. The Halon in ICI's Storage Tanks had up to 125 ppm of moisture by ICI's own test method—or up to 1375 ppm by the MilSpecs Test. ICI *had* been able to make low (1 ppm) moisture Halon 1211 before it modified its process, and installed a new large bulk Storage Tank in the Spring of 1981.

D. ICI suppressed these records (Exs. P-38 & P-39), during discovery, and, instead furnished Mikulec with a fabricated Book, P-46, which omitted this data.

E. ICI concealed from Mikulec that it wrote the USAF on January 16, 1981 that 200 ppm (0.02%) MilSpecs moisture level was erroneous, and should be 20 ppm (0.002%); and, that 70 ppm or more of moisture causes corrosion.

F. ICI's Plant Manager, Horlbeck, testified that ICI had two grades of Halon, and that it supplied its "Military" customers, such as Mikulec, with the low-grade 200 ppm Halon, and its "commercial" customers with its better grade 20 ppm Halon (Appendix G, App. 31a).

G. In September, 1982, Mikulec employees discovered liquid "gook" and "coffee grounds" in *two* of ICI's *sealed* Tanks from ICI's first shipment to Mikulec. The employees were able to spray a "brown pattern."

H. ICI admitted the presence of "contaminated" Halon and "rust", after Mikulec returned one of the Tanks. ICI issued a Credit Memo; but assured Mikulec that the rust was "nothing to be concerned about."

I. In July, 1983, Mikulec employees found water and corrosion in *two* more *sealed* ICI Tanks at Mikulec's Plant (These Tanks were produced at the trial).

ICI's Unanswerable "Omissions"

These "smoking guns" were not surprising, since ICI's omissions, demonstrated an abject lack of concern for the US Military Forces by the world's largest chemical company, and were further "direct proof" that ICI supplied Petitioner with contaminated, corrosive Halon 1211. These *omissions* included:

A. ICI did *not* make the MilSpec mandated pre-filling inspections of the inside of its Halon 1211 shipping Tanks—to insure they were free from moisture and corrosion.

B. ICI did *not* make the MilSpec mandated post-filling moisture tests of the contents of its Halon 1211 shipping Tanks.

C. ICI did *not* follow the pre-shipment "Lot Acceptance" and "Lot Rejection" procedures required by the MilSpecs.

D. ICI did *not* use the MilSpecs Test for moisture, but, rather, used its own "proprietary" unauthorized test, which it knew read only 1/11th (9%) of the MilSpec test reading (Appendix F, App. 30a).

E. ICI did *not* reveal that its method produced moisture readings of only 1/11th of the USAF MilSpec Test Method for moisture (Appendix F, App. 30a).

F. ICI did *not* supply "domestic" Halon 1211 under the "Buy American" clause of Petitioner's USAF contract, but clandestinely substituted imported U.K. Halon.

G. ICI did *not* test the imported Halon 1211 before it secretly dumped it into the Storage Tanks at its Plant.

H. ICI did *not* permit Petitioner to purchase available low-moisture (3 ppm), and cheaper imported Halon 1211, when ICI could not deliver conforming domestic Halon.

I. ICI did *not* make any analyses of the Halon 1211 it shipped to Petitioner, as required by its contract.

J. ICI did *not* furnish Petitioner with "Certificates of '*Chemical*' Analysis" of each Tank of Halon 1211 shipped to Petitioner, as required by its contract.

K. ICI did *not* furnish true Certificates of Analysis, but, rather, fraudulent "Certificates of *Compliance*", which were "rubber-stamped" by a secretary, without any testing, and falsely labeled "Certificates of Analysis".

L. ICI did *not* use the correct 20 ppm MilSpecs moisture limit, but *knowingly* used a typographical error to sell *admittedly* corrosive 200 ppm Halon 1211 to Petitioner.

M. ICI claims that it made Halon 1211 on what it called a "continuous" basis, which, it asserted "exempted" it from the MilSpecs. The the MilSpecs make no provision for "continuous" production, and do not contain such an "exemption".

N. ICI did *not* test its Storage Tanks prior to filling its shipping Tanks with Halon for Petitioner.

ICI's Fault was Corroborated by Independent Witnesses

There was reliable, independent corroboration—by impartial witnesses and evidence—that ICI was the source of the excess moisture and corrosion in the Halon.

McDill US Air Force Base Fire Officials found corrosion in ICI Tanks of Halon 1211 which had been purchased *directly* from ICI. The Halon was delivered to McDill in ICI shipping Tanks which came directly from ICI's Plant—and had no contact with Petitioner. McDill also found corrosion in the fire extinguishers which it refilled from these ICI tanks (Exs. P-62-75; Jt. App. pg. 1865; Depositions of McDill Officials Fail & Warhaul, Jt. App. pgs. 2196-2335; USAF Telexes, Fail Dep. Exs. 14 & 15, Jt. App. pgs. 2204-7).

Further independent corroboration came from impartial *former* hourly-rated employees of Mikulec, who had long since severed their relations with Mikulec. They testified that they had noticed coffee grounds and brown "gook" coming from *sealed* ICI Tanks in September, 1982. These Tanks were part of ICI's first Halon shipment to Mikulec for its USAF contract. They reported the "gook" to their Superior, and together they found the gook in another Tank. Both Tanks sprayed a brown pattern on the wall—whereas pure Halon 1211 is clear and colorless.

When Mikulec returned one of these tanks to ICI in September, 1982, ICI confirmed the presence of rust, and issued a credit to Mikulec. This stands as an admission of the problems ICI was having in producing pure Halon (See ICI Credit Memo, Exhibit P-21-23, Jt. App. pgs. 1943-1948). In its letter of January 17, 1983 issuing the credit, ICI admitted that the Halon was "contaminated" (Exhibit P-23).

ICI's suppressed Moisture Books, Exs. P-38 & P-39, and its fabricated substitute phantom Moisture Book, Ex. P-46, furnish further irrebuttable corroboration of ICI's inability to make Halon 1211 to meet the MilSpec 20 ppm moisture limit.

These suppressed Moisture Books prove that, prior to the Spring on 1981, when ICI modified its Plant and process, and installed a new larger bulk Storage Tank, ICI *consistently* was able to produce Halon 1211 with LESS than 1 ppm moisture.

ICI never regained this ability. After the Spring of 1981 ICI produced Halon with 220 ppm to 1,375 ppm of moisture—which grossly exceeded the MilSpecs (See Chart of ICI Lab Book and Moisture Book entries, Exs. P-61H & P-61L). Since ICI could not eliminate the moisture, it created its own, LOWER reading, "Proprietary Test" method in order to reduce the moisture readings which would result from use of the MilSpecs Test Method. ICI's own correlation of the "ICI" and "US" Tests, showed that ICI's test method gave only 9% (1/11th) of the true MilSpec moisture level (See: Appendix F, App. 30a).

The Basis for Federal Jurisdiction in the District Court

Petitioner sued ICI in the U.S. District Court for the Western District of New York, alleging Sherman Act §§1 & 2 monopolization and restraint of the domestic and US Military market for Halon 1211. Petitioner also claimed *pendente* jurisdiction, as well as diversity, for its additional claims of breach of contract, negligence, fraud and misrepresentation.

REASONS FOR ALLOWANCE OF WRIT

I. The Second Circuit ignored its prior decisions on "Direct Proof" in defective product cases.

The Second Circuit anomalously held that plaintiff's *unanswerable* "direct proof" of defendant's defective Halon 1211, and its consequent breach of plaintiff's contract, was "*not* direct proof" of a defective product. This decision *ignored*, and was contrary to its prior decisions on the standard of "direct proof" in *Ajax Hardware Mfg. Co. v. Industrial Plants Corp.*, (CA2; 1977) 569 F2d 181, 186; and in *Meyers v. Selznick Company*, (CA 2; 1966) 373 F2d 218, 221-4.

The Second Circuit also mistakenly interpreted, and improperly relied on the Opinion of Judge Wright of the Court of Appeals for the District of Columbia Circuit in *Stewart v. Ford Motor*, (CA:DC; 1977) 553 F2d 130.

By sanctioning the District Court's dismissal of the jury, and the direction of a verdict for defendant, despite plaintiff's *overwhelming*—and unanswerable—"Direct Proof" by multiple "smoking guns", and by defendant's unconscionable "omissions", the Second Circuit affirmed the denial to plaintiff of due process, and of its right to a trial by jury, guaranteed by amended Article 7, 28 USC 1861 and FRCP 38(a) (See: *Simler v. Conner*, (1963) 372 US 221; *Huddell v. Levin*, (CA 3; 1976) 537 F2d 726).

Petitioner does not claim that there is a "right" to a trial by jury where there is no evidence (Cf.: *Sparf v. U.S.*, (1895) 156 US 99; *Treat Mfg. Co. v. Standard Steel Co.*, (1895) 157 US 674; *Lyon v. Mutual Benefit H & A Ass.*, (1939) 305 US 484, reh. den. 306 US 667).

Considering, however, the overwhelming evidence in this case,—*directing* a verdict was a denial of plaintiff's right to a jury trial. The "questions of fact" were established: by actual corrosion and rust taken from ICI *sealed* Tanks; by ICI's admissions and records; by ICI's Lab Book entries of excess moisture; by the admissions of its Officials; by ICI's failure to make MilSpec moisture Tests; by ICI's

clandestine substitution of untested, "imported" Halon for "domestic", tested Halon required to satisfy the MilSpecs, and the "Buy American" Act; by ICI's suppression of the serious MilSpec error; by ICI's perverse decision to utilize the MilSpec error to its advantage; and by ICI's abuse of its 100% monopoly by "forcing" its inferior grade and contaminated 200 ppm Halon on its "U.S. Military" customers, such as plaintiff, and reserving its "higher" grade 20 ppm Halon for its "commercial" customers (Appendix G, App. 31a).

The "direction of a verdict", and the dismissal of the jury, under such appallingly aggravated circumstances, was an infringement of plaintiff's constitutional right to a trial by jury (See: Concurring Opinion, Newman, C.J., in *Antilles S.S. Co. v. Members of American Hull Ins. Syn.*, (CA 2; 1984) 773 F.2d 195, 203-6; *Painton & Co. v. Bourns, Inc.*, (CA 2; 1971) 442 F2d 216, 233; and, *Blue Ribbon Ice Cream Co. v. Banner Roofing Co.*, (AD 2; 1963) 18 AD2d 1074, 239 NYS2d 574). Such a right exists even in "thin" cases (*Necaise v. Chrysler Corp.*, (CA 5; 1964) 335 F2d 562), and, *a fortiori*, in this overwhelming case.

Plaintiff finds itself out of Court, and deprived of a jury, despite all this overwhelming evidence, *only* because the Second Circuit changed the "rules of the game". The Second Circuit ignored its longstanding decisions on the standard of "Direct Proof" in product defect cases (Such as: *Ajax Hardware Mfg. Co. v. Industrial Plants Corp.*, supra, and *Meyers v. Selznick Company*, supra).

It also misinterpreted learned Judge J. Skelly Wright's comprehensive opinion in *Stewart v. Ford Motor Co.*, supra, where Judge Wright emphasized that the burden to "negative" other possible causes "is *not* great". Instead, it improperly held that there was "no direct proof", and that plaintiff had to negative every other "possible" cause of the corrosion—an *impossible* burden!

II. ICI was allowed to flout the "Buy American" Act, the USAF MilSpecs and Plaintiff's contract.

A. The "Buy American" Act

Plaintiff's fire extinguisher contract with the USAF was subject to the "Buy American" Act, 41 USCA 10a-c, and to USAF MilSpecs MIL-B-38741 for Halon 1211 (Ex. D-6, face page, pp. 1, 4 and 22; Jt. App., pp. 2029, 2032 and 2038A-B, Reference No. 31).

Plaintiff's contract with defendant ICI, in turn *incorporated*, by reference, plaintiff's Air Force contract (Ex. P-6, Jt. App., p. 1873). Defendant ICI's correspondence and invoices reflected that ICI knew that the Halon was intended for plaintiff's USAF contract (Exs. P-7 and 9; Jt. App., pp. 1875-9 and 1886-1913).

Despite Congressional intent in the Buy American Act, and the stringent MilSpec Test requirements, ICI was allowed to evade any responsibility for evading its obligations thereunder. The Court thus allowed ICI to clandestinely substitute untested imported Halon from its British plant, while steadfastly maintaining that it was supplying conforming tested "domestic" Halon.

B. The MilSpec Test Method

ICI claimed that it was "exempt" from the MilSpec Test requirements because it produced Halon on a "continuous" basis, and therefore, was not required to test the Halon tanks before shipping them to plaintiff.

Nowhere do the MilSpecs (Appendix E, App. 25a), provide for any exemption based upon the "method" of production. Rather the MilSpecs provide for testing, sampling and acceptance on a "Lot Acceptance" basis. It required ICI to take "not less than two containers" from each "lot of filled containers" (MilSpec 4.2.3; Appendix E, App. 26a). Since defendant shipped its

Halon in "Lots" of 22 shipping Tanks (Ex. P-9), the MilSpecs required that not less than two containers of each lot of 22 be selected for testing.

An 'Inspection lot" is defined as Halon 1211 "manufactured as one batch and offered for delivery at any one time . . ." (Appendix E, App. 26a).

Defendant admittedly did *not* sample two Tanks out of each lot of 22 Tanks which it sent to plaintiff. After the corrosion problem developed, it experimented with *one* such inspection, but did not carry it through.

Instead, defendant's procedure was to inspect its 250,000-lb. and 125,000-lb. bulk storage Tanks every few weeks. However, even these readings of its bulk storage Tanks showed the presence of moisture grossly in excess of the 20 ppm proper MilSpec level (Ex. P-61H and 61L; Jt. App., pp. 2011-2026).

Even without applying the 11X (1,100%) calibration factor which ICI found was necessary to correlate its "proprietary" test method—which read 5.7 ppm for the same sample that the MilSpec test read 62 ppm of moisture—ICI's bulk Tank moisture readings went up to 125 ppm of moisture by ICI's own unauthorized method. This was six times the MilSpecs limit, and almost double the 70 ppm level at which corrosion begins! Applying ICI's own correction factor from its own calibration test, which appears in ICI's Lab Book (Ex. P-36A; Appendix F, App. 30a), results in bulk Tank moisture readings of up to 1,375 ppm, which is sufficient to have water and hydrochloric acid corrosively sloshing around in the Tank.

ICI's claim that it only had to test its large bulk storage Tanks is not an answer. This procedure violates the MilSpec Test requirements. Moreover, even the Halon in the storage Tanks grossly exceeded the 20 ppm MilSpec limit—by the ICI test method, and without converting the readings to the 11X higher MilSpec test calibration (Appendix F, App. 30a).

C. The MilSpec Tank Inspection Requirement

Further, ICI *admittedly* did not inspect the "interiors" of its shipping Tanks *before* it filled them, as required by MilSpec 5.1.1 (Ex. P-18A; Appendix E, App. 27a and 28a). This MilSpec provision requires that the Tanks be inspected *internally* to insure that they are "free from contamination and are suitable for shipment and storage".

The only way for ICI to obtain such assurance would be by an inspection of the interiors of its shipping Tanks *before* it filled them with Halon. ICI *admittedly* did not make these inspections before filling its Tanks. Thus, whatever moisture or corrosion already was in its shipping Tanks remained there, and was added to the moisture from the incoming Halon, thereby further elevating the ppm of moisture in the Halon.

Since ICI's shipping Tanks were recycled, like glass pop bottles, they go from customer to customer. ICI admits that allowing a shipping Tank to stand with an open valve for any length of time will introduce sufficient moisture to create corrosion, so exacting is the hydroscopic and corrosive nature of Halon 1211.

ICI's shipping Tanks admittedly were stored outside in the rain and elements until they were re-filled.

Compounding this, ICI's shipping Tanks were manufactured by a company which tested them hydrostatically—i.e., with water pressure. Plaintiff showed on the trial that it is impossible to excise all of the water and moisture from the Tank after it has been hydrostatically tested. Plaintiff showed that ICI's Tank supplier had been sued by another Halon supplier for delivering shipping Tanks—identical to those used by ICI—which contained water left over from the hydrostatic test (Exs. P-41 and 42).

Since defendant did not inspect the interiors of these shipping Tanks *before* filling them, the quality of ICI's incoming Halon was immaterial. The purest Halon could be contaminated merely by being placed in a Tank which had been sitting for a day or two with an open valve. Obviously, this is the reason why the MilSpecs insisted on an inspection of the inside of the Tanks *before* filling them, as well as a test of the "contents" of the shipping Tanks *after* they had been filled. This ICI never did!

D. ICI's "Certificates of Analysis" and Bills of Lading were fraudulent.

In addition to its failure to inspect the interiors of its Tanks *before* filling them, and to test the contents of its Tanks *after* filling them, ICI furnished plaintiff with false "Certificates of Analysis", and Bills of Lading, purporting to attest that it did inspect and test.

Defendant's "Certificates of Analysis" specifically listed each of the 22 Tanks in the "Lot" being shipped to plaintiff, and certified that they meet the MilSpecs. These Certificate of Analysis were fraudulent. No test was ever made of even one Tank, much less two Tanks, or, of any one Lot, to see if it met the MilSpecs.

Bulk storage Tank testing is only a "manufacturing control". The US Air Force was seeking a test of the contents of the Tank *after* it had been filled, and *after* the new Halon had mixed with whatever was still in the Tank.

On the trial, it developed that these so-called Certificates of Analysis were prepared by a secretary who had *no knowledge* of the quality of the Halon. She automatically typed up the Certificate, and affixed a rubber-stamp signature (See typical "Certificate of Analysis" for November 23, 1982, Ex. P-9; Jt. App., p. 1894).

Similarly, defendant issued fraudulent Bills of Lading for each "Lot" of 22 Halon 1211 shipping Tanks which it sent to plaintiff. The typical Bill of Lading (Ex. P-9; Jt. App., p. 1897) falsely recites, "These cylinders must meet government inspection ... Certificate of Analysis required."

However, the cylinders *never* were inspected internally for corrosion *before* filling, as required by MilSpec 5.1.1, nor were the contents ever analyzed *after* filling, as required by MilSpec 4.4.2, *et seq.* ICI's Moisture Book and Lab Book entries proved that its Halon did not conform to the MilSpec moisture limits.

This produced absolute, unimpeachable, unrebuttable and overwhelming "direct proof" of ICI's breach of the MilSpec testing and inspection requirements, and breach of the Buy American Act, and breach of ICI's contract with Mikulec, which incorporated the MilSpecs and Buy American Act.

III. Defendant was allowed to benefit from its suppression of damaging evidence on discovery.

Defendant's discovery responses deviously suppressed vital, relevant and material facts which substantiated plaintiff's claims.

Defendant's willful suppression of discoverable material which was unquestionably required by plaintiff's discovery requests included: suppression of the MilSpecs error, and suppression of its Moisture Books, and the substitution of a fraudulent version.

A. Suppression of the MilSpec Error

Defendant's January 16, 1981 letter to the U.S. Air Force notified the Air Force that the 200 ppm limit of moisture in Halon 1211 was in error, since 70 ppm causes corrosion. It "diplomatically" suggested that the MilSpec should have read 20 ppm maximum moisture, since that was the ISO (and BSI) world-wide limit on moisture in Halon.

Defendant, on discovery, suppressed *both* its knowledge of the MilSpec error, as well as its January 16, 1981 letter concerning the MilSpec error. On its depositions, and in its Officials' affidavits and letters, defendant steadfastly maintained that the *only* standard was 200 ppm of moisture and denied that there were such letters. In fact, ICI "deceptively" suggested that if plaintiff knew of any other moisture standard, it should "share this information . . . with ICI" (Ex. P-20QQ; Jt. App. page 1942).

Fortunately, shortly before the trial, plaintiff was able to obtain a copy of the letter by a F.O.I.Act request directed to the Air Force.

The calumny—and unpatriotic perversity—of ICI was demonstrated when its Plant Manager Horlbeck testified on the trial that ICI made *two* grades of Halon, a 200 ppm "Military" grade for sale to the U.S. Government, and Government contractors such as plaintiff, and a "higher" grade 20 ppm product for sale to "commercial" customers. Instead of being penalized for this egregious conduct, ICI was allowed to benefit from it (Appendix G, App. 31a).

B. Suppression of Moisture and Lab Book Data.

Defendant's other major suppression on discovery occurred when it fabricated a phantom "Moisture Book" (Exhibit P-46), and presented it to plaintiff in the course of the first round of depositions. Plaintiff relied on this fraudulent "phantom" Moisture Book in preparing for trial, and, throughout the trial.

Shortly before plaintiff rested, the existence of the *actual* Moisture Books *accidentally* were revealed (Exhibits P-38 and P-39). These suppressed books contained a vast amount of damaging data which directly supported plaintiff's contentions. None of these entries were present in the fabricated "phantom" book (Exhibit P-46).

The suppressed actual Moisture Books proved that:

A. ICI had been able to make pure Halon—with only 1 ppm of moisture—until the Spring of 1981 when it changed its manufacturing process and installed a new large storage tank. For almost a year after that, it was unable to produce Halon in any quantity, and had to start importing Halon. ICI never again was able to produce low ppm Halon, but rather Halon varying between 220 and to 1375 ppm, which was grossly in excess of the allowable moisture level, and wildly corrosive (Exhibits P-61H & 61L, and P-36 & P-36A).

B. During this hiatus in its operations, ICI began "importing" Halon from Great Britain. The suppressed Moisture Books demonstrate that ICI clandestinely dumped *untested* "U.K." Halon into its storage tanks at the time when it was supposedly supplying plaintiff with certified "domestic" Halon, tested to MilSpec standards. This suppressed information was contrary to ICI's protestations on its depositions, where it denied that it supplied imported Halon to plaintiff.

ICI's perfidy was compounded by its objection to plaintiff obtaining low moisture 3 ppm certified pure Halon from France or Japan, by its refusal to furnish actual "Certificates of Chemical Analysis, and its continuing insistence that its (untested and imported) Halon was fully conforming non-corrosive Halon.

Plaintiff received notice of termination of its U.S. Air Force fire extinguisher contract because of the corrosion which the Air Force deemed an "endangerment to life and property" (Exhibit P-28, Jt. App. page 1951). In an attempt to reinstate its USAF contract, plaintiff sought injunctive relief via a Court direction to ICI to supply certified pure domestic Halon *accompanied* by actual "Certificates of Chemical Analysis" and "Certificates of Compliance" as required by plaintiff's Purchase Order, Exhibit P-6.

Despite the knowledge that it was supplying untested imported Halon, manufactured to the erroneous corrosive 200 ppm standard—due to the error in the MilSpec, which ICI alone knew about—ICI opposed plaintiff's request, and refused to supply the conforming Halon. This should be considered in the light of its Plant Manager's admission that it had two grades of Halon, and supplied the "higher" 20 ppm grade to its "commercial" customers, and that it supplied plaintiff, and its other "Military" customers, with its "lower", and corrosive, 200 ppm grade (Appendix G, App. 31a).

C. Defendant was allowed to benefit from its suppression.

Defendant having wrongfully suppressed material facts on discovery, should have been penalized. Instead, it was allowed to benefit therefrom. Even if the suppression took the form of "silence", there was a duty to disclose on discovery (*Simpson Timber Co. v. Palmberg Const. Co.* (CA9 : 1967) 377 F2d 380; *Westinghouse Electric Corp. v. Garrett Corp.* (DC Md: 1977) 437 F.Supp. 1301, aff'd (CA4 : 1978) 601 F2d 155; *U.S. ex rel. Roman v. Schlesinger* (DC NY : 1975) 404 F.Supp 77). ICI did much worse than keep silent—it deliberately misled Plaintiff (Ex. P-20QQ, Jt. App. 1942).

D. Plaintiff should have received a Procedural benefit.

When defendant moved for a directed verdict, plaintiff requested the trial court to accord it equitable procedural relief in view of defendant's wrongful suppression of vital evidence on discovery.

Plaintiff requested that it should, *inter alia*, have the "benefit" of all of the evidence adduced, in considering defendant's Motion for a Directed Verdict. At this point, defendant has presented four days of proof, and plaintiff had obtained vital admissions on cross-examination from defendant's Officials. But for defendant's wrongful suppression, plaintiff undoubtedly would have obtained the same admissions on discovery, and would have been able to present them on its own case.

The trial court denied this request. Thus, far from being penalized for its wrongful suppression of vital evidence on discovery, defendant obtained a directed verdict, and a dismissal, on the ground that plaintiff had not been able to present "sufficient evidence" to raise a question of fact for the jury. Such a result was a perversion of "the normal course of justice".

All of the above notwithstanding, the compelling evidence which Plaintiff had already presented, was well beyond that required for it to sustain its burden of proof.

IV. Sherman Act claim for abusing 100% monopoly could not be "waived" by deferring it in an FRCP 42(b) bifurcation.

Plaintiff, having been prevented from obtaining injunctive relief, and "threshold" summary judgment, by the District Court's crowded calendar, settled for the Court's promise of an early trial.

When the prospect of a trial continued to be delayed, plaintiff requested bifurcation of the issues of liability and damages under FRCP 42(b). Defendant objected to a simple bifurcation, and requested a specification of individual issues. Plaintiff objected, but the District Judge ordered plaintiff to specify issues. Plaintiff accordingly specified "Primary Issues" and "Secondary Issues" to be tried "separately", and sequentially, in order to expedite the early commencement of the trial.

Plaintiff's third "Primary Issue" dealt with whether the corrosion in ICI's Halon was a result of any "negligent or wrongful actions or omissions". Considering defendant's wrongful abuse of its monopoly position, and its "forcing" of inferior 200 ppm Halon on plaintiff, the antitrust and fraud claims were clearly within the ambit of this "Issue". To expedite the commencement of the trial on the "Primary Issues", plaintiff deferred the following "Secondary Issue":

> "Were Defendant's *wrongful* actions *willful, fraudulent,* or *aggravated,* such that Plaintiff is entitled to *punitive* or *exemplary* damages, and, if so, in what amount?" (Emphasis supplied)

This issue clearly reserved the multiple damage aspects of plaintiff's fraud and antitrust claims.

Plaintiff's opening statement informed the Court there never was any intent to abandon fraud and antitrust, since the *same* issues support all claims:

> "Now, I would like to call Your Honor's attention to the fact that issue G, a secondary issue, is an issue on *fraud*. We were willing, specifically mentioned in there, to have *fraud* follow in the *second trial*. Now, if Your Honor believes that fraud should be in the first trial, I have no objection. But I thought that a simpler trial would be with fraud to follow later. However, to (sic) the *same issues* of fact will support *antitrust*, DOT, and *fraud*." (Emphasis supplied)

The holding that plaintiff "waived" its antitrust and fraud claims represents a perversion of the intent of FRCP 42(b). The purpose of a separate trial is to further convenience, avoid prejudice and expedite trials. Rule 42(b) specifically preserves "inviolate" all constitutional and statutory rights.

Instead, a rule designed to "avoid prejudice" was used to create prejudice. Plaintiff did not request a specification of issues—it was ordered to comply with defendant's request. If a separation of issues creates prejudice, the Court had no right under Rule 42(b). It was not permitted to "effect a forfeiture". Rather, it was required to *deny* the separate trial or separation of issues (*Arnold v. Eastern Airlines* (CA 4, *in Banc*; 1983) 712 F2d 899, cert. den. (1984); 464 US 1040; *Franklin Music Co. v. American Broadcasting Co.* (CA 2, 1979) 616 F2d 528, 538; *Garber v. Randell* (CA2, 1973) 477 F2d 711, 714). A "specification of issues" under FRCP 42(b) cannot be deemed an "abandonment", such as where pleadings are amended (See: FRCP Rule 15; *Wichmann v. United Disposal, Inc.* (CA 8, 1977) 553 F2d 1104, 1106).

It was unconstitutional to order a severance, if the price of the severance is "*ex post facto*" notice of the waiver and abandonment of valuable claims. "Due process" required the plaintiff to have concurrent notice that such a penalty was being exacted by the Court for specification of the issues, and, an opportunity to withdraw the offer.

V. Petitioner was denied an orderly "due process" trial by jury.

Petitioner duly requested, and was entitled to, a trial by jury (Amended Article VII; 28 USCA 1861, *et seq.*; FRCP 38(a)). A jury was selected on September 25, 1984, but the trial was delayed for *over* 19 months, until May 1, 1986! Due to the press of criminal matters, civil matters took a back seat.

The Trial Court's Opinion apologized for the "sandwiching" of this trial into "whatever niches existed in the matrix" caused by the mandates of the Speedy Trial Act, 18 USC §3161, *et seq.* (Appendix D; App. 12a).

Earlier, the press of criminal trials prevented petitioner from obtaining summary judgment or injunctive relief that would have forced ICI to supply plaintiff with pure "domestic" Halon 1211, accompanied by "Certificates of Chemical Analysis" and "Certificates of Compliance" with the MilSpec test requirements—as required by petitioner's contract with ICI, by the Buy American Act, 41 USCA 10a-c, and the MilSpecs.

Immediate relief was vital, since plaintiff had been given notice of termination of its USAF fire extinguisher contract because of the corrosion, and had to curtail production because of the "time bombs" caused by the corrosion. Plaintiff could have reinstated its contract, *if* it could have obtained "certified" pure, tested, domestic Halon, accompanied by Certificates of Chemical Analysis.

This was not fantasy, since ICI's Plant Manager, Horlbeck, testified that it made both 200 ppm Halon, which was admittedly corrosive, for its US "military" customers, and its higher grade 20 ppm Halon for its "commercial" customers (Appendix G, App. 31a).

Thus, summary judgment or injunctive relief, early on, could have saved plaintiff's USAF fire extinguisher contract, and terminated this litigation.

Instead, the District Judge "promised" an early trial. Due to the press of criminal matters, that "early" trial never occurred, and plaintiff was forced into Chapter 11 Reorganization (Appendix D, App. 9a and 12a).

The Trial Judge apologized for these problems, and quoted plaintiff's counsel's summary of his arcane dilemma:

> "What the Speedy Trial Act does to those who wish to have a civil case tried, is a crime." (Appendix D, App. 12a).

When the jury trial finally commenced on May 1, 1986, it continued for 22 days, until the Court was forced to adjourn. Plaintiff urged the Court to continue the trial, since defendant had only two more witnesses. However, the Court could not comply with this request because it had to start a criminal trial under the Speedy Trial Act.

The jury was sent home on July 24th, and told that it would be notified of the resumption of the trial. Despite repeated urgings, the Court did not recall the jury, but continued its criminal trial schedule, and "sandwiched" in other civil matters, for over *five months*, until December 30, when it granted defendant's motion for a directed verdict, and dismissed the jury.

In October, after the jury had been recessed for three months, plaintiffs filed a request with the Second Circuit for a mandamus to the District Court to recall the jury (CA2; Docket No. 86-3052). However, the Second Circuit took no action on the mandamus request for almost a year—and finally dismissed the mandamus request on September 24, 1987 as "moot"—a highly departure from the "normal course of justice".

The District Court's brief Opinion (Appendix A, App. 13a), lacked any analysis of plaintiff's overwhelming proof. It apparently reflected the pressure on the Trial Court by criminal matters under the Speedy Trial Act. The Trial Court did not even have time to allow plaintiff to read the depositions to the jury. Instead, it finally adopted the unusual plan of having the jury read the depositions in seclusion.

Apparently due to its criminal calendar, the Court was unable to determine what exhibits were in evidence, despite a long period of "wrestling" with the problem (Appendix D, App. 13a). The Trial Court did not reach a decision on which exhibits were in evidence until a few days before the argument of plaintiff's appeal before the Second Circuit. Thus, it was not until almost *two years later* that the Trial Court found time to decide what was in evidence, all to plaintiff's prejudice on the appeal.

Thus, the Speedy Trial Act—however meritorious in its own right—caused a denial to plaintiff of its right to a trial by jury, as well as due process, in this action.

Conclusion

For the foregoing reasons Petitioner submits that the Supreme Court of the United States should issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review, reverse and remand its decision affirming the District Court's Order.

Respectfully submitted,

ARNOLD WEISS, ESQ.
Designated Counsel of Record
RAICHLE, BANNING, WEISS
& STEPHENS
Attorneys for Petitioner
1400 Main Place Tower
Buffalo, New York 14202
(716) 852-7587

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit, dated and filed October 3, 1988 (unreported), denying rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the third day of October, one thousand nine hundred and eighty-eight.

MIKULEC INDUSTRIES, INC.,
Plaintiff-Appellant
Cross-Appellee,

vs.

ICI AMERICAS, INC.,
Defendant-Appellee
Cross-Appellant.

Docket Number 88-7096, -7506,
and 88-7518

UNITED STATES COURT OF APPEALS

FILED OCT 3 1988

ELAINE B. GOLDSMITH, Clerk
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant Mikulec Industries, Inc.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk
By: Frederic Cassidy

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit, dated and filed July 6, 1988, affirming the District Court's dismissal of the action

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Sixth day of July, one thousand nine hundred and eighty-eight.

Present: HONORABLE JAMES L. OAKES,
HONORABLE THOMAS J. MESKILL,
HONORABLE LAWRENCE W. PIERCE,
Circuit Judges.

MIKULEC INDUSTRIES, INC.,
Plaintiff-Appellant,

vs.

ICI AMERICAS, INC.,
Defendant-Appellee.

Docket Nos. 88-7096
88-7506
88-7518

This is an appeal from a judgment entered in the United States District Court for the Western District of New York, Elfvin, *J.*, granting defendant-appellee's motion for a directed verdict pursuant to Fed. R. Civ. P.

50(a). The case arose out of the cancellation by the United States Air Force of a contract with Mikulec Industries, Inc. (Mikulec) for Halon-filled fire extinguishers because of moisture-caused corrosion found in the product delivered.

Mikulec subsequently initiated this action against ICI Americas, Inc. (ICI), alleging that (1) ICI had negligently sold it Halon improperly adulterated with moisture, thereby causing the corrosion in the fire extinguishers; (2) ICI had breached its contract to sell Mikulec Halon that complied with industry and governmental standards; (3) ICI had committed fraud; (4) ICI had improperly secured and maintained a monopoly in the domestic Halon market, in violation of the Sherman Act, 15 U.S.C. §1 *et seq.*; and (5) ICI had shipped improperly filled Halon tanks in violation of regulations promulgated by the United States Department of Transportation (DOT) pursuant to 49 U.S.C. §507.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED.

Prior to trial Mikulec requested a procedure whereby "liability and damages" would be tried in bifurcated proceedings. *See* J. App. at 78-81. In a Specification of Issues for Separate Trial subsequently filed pursuant to Fed. R. Civ. P. 42(b), Mikulec only sought resolution of liability issues arising out of its claims based on negligence and breach of contract. *See* J. App. at 82-83. Judge Elfvin properly ruled that Mikulec had thereby abandoned its fraud claim and its claims based on the Sherman Act and the DOT regulations. *See id.* at 90-100. We therefore refuse to consider issues that were not

properly raised in the proceeding below. *See, e.g., Schmidt v. Polish People's Republic*, 742 F.2d 67, 70 (2d Cir. 1984).

As to the claims based on negligence and breach of contract, we should uphold the district court's directed verdict if " 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [jurors] could have reached.' " *Croce v. Kurnit*, 737 F.2d 229, 237 (2d Cir. 1984) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)). Judge Elfvin properly entered a directed verdict as to both claims. Where, as here, there is no direct proof that a defendant's negligence caused a claimed defect in a product, the plaintiff generally must produce evidence tending to exclude all other possible causes not attributable to the defendant. *See, e.g., Stewart v. Ford Motor Co.*, 553 F.2d 130, 137 (D.C. Cir. 1977); *Shelden v. Hample Equipment Co.*, 89 A.D.2d 766, 453 N.Y.S.2d 934, 935 (3d Dep't 1982) (mem.), *aff'd*, 59 N.Y.2d 618, 463 N.Y.S.2d 194, 449 N.E.2d 1272 (1983). Mikulec failed to meet this burden. In fact, Mikulec failed adequately to discount many potential causes of corrosion raised by ICI, including many allegedly faulty procedures employed by Mikulec itself at its manufacturing plant. We do not believe that any reasonable juror could have concluded that ICI delivered Halon that failed to meet the contract specifications. Therefore, even viewing all of the evidence in the light most favorable to Mikulec, *see Oboler v. Goldin*, 714 F.2d 211, 212 (2d Cir. 1983) (per curiam), we affirm the district court's conclusion that ICI was entitled to a directed verdict.

The parties also attempt to appeal and cross-appeal from a June 8, 1988 order in which Judge Elfvin ruled on several outstanding evidentiary matters. They seek to consolidate those appeals with this one. When ICI's directed verdict motion was argued, Judge Elfvin indicated that he would consider the motion "on a premise that all that has been offered is in evidence," *see* J. App. at 1806, and that he would consider virtually all of Mikulec's proffered exhibits as being "part of the Plaintiff's case," *id.* at 1838. These statements appear to be inconsistent with the June 8 ruling, in which Judge Elfvin indicated that he had reached decisions to admit some evidence and exclude other evidence *before* deciding the directed verdict motion.

Once a proper appeal from a final judgment is taken, a district court may take action only in aid of the appeal or to correct purely clerical errors. *See Leonhard v. United States,* 633 F.2d 599, 609-10 (2d Cir. 1980), *cert. denied,* 451 U.S. 908 (1981). Here, Judge Elfvin's June 8 order does not fall into either of those categories, particularly since his earlier comments indicate that he considered the directed verdict motion in light of all of the evidence before him—both admitted and unadmitted. We affirm the judgment of the district court based on that assumption. We grant the motion to consolidate, we vacate Judge Elfvin's order of June 8, 1988, and we dismiss the appeal and cross-appeal from the June 8 order as nullities.

James L. Oakes, *U.S.C.J.*
Thomas J. Meskill, *U.S.C.J.*
Lawrence W. Pierce, *U.S.C.J.*

N.B. This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

ISSUED AS MANDATE: Nov. 2, 1988

APPENDIX C

Order and Final Judgment of the United States District Court for the Western District of New York, per Elfvin, J., dated and entered December 31, 1987 (unreported) dismissing the action

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-83-939E

MIKULEC INDUSTRIES, INC.,

Plaintiff,

v.

ICI AMERICAS, INC.,

Defendant.

SIR/MADAM: Take notice of an ORDER, of which the within is a copy, duly granted in the above entitled action on the 14th day of November, 1988, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 14th day of November, 1988.

Dated: Buffalo, New York
November 14, 1988

MICHAEL J. KAPLAN, CLERK
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

To: Arnold Weiss, Esq.
William L. Rieth, Esq.

APPENDIX D

Order and Opinion of the United States District Court for the Western District of New York, per Elfvin, J., dated and filed December 30, 1986, directing a verdict of dismissal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-83-939-E

MIKULEC INDUSTRIES, INC.,

Plaintiff,

v.

ICI AMERICAS INC.,

Defendant.

The Court having entered its Order on December 30, 1986 granting Defendant's motion for a directed verdict of dismissal; and

The parties having filed a Stipulation dated December 18, 1987 for the entry of final judgment, which is incorporated herein by reference; it is hereby

ORDERED, that Defendant's motion for a directed verdict of dismissal is granted, and the Clerk shall enter final judgment dismissing Plaintiff's Complaint and Reply Counterclaims herein; and, it is further

ORDERED, that Defendant is entitled to judgment in its favor in its counterclaims I and II in the amount of $10,147.50, with interest thereon from July 20, 1983, and for the return of any of ICI's tanks remaining in MI's possession after the final conclusion of this litigation, which said judgment shall be, in all respects, final, except that it may not be executed upon and shall not be or amount to a lien or encumbrance upon any of the Plaintiff's property, and shall not afford the Defendant any priority over other creditors in the Plaintiff's pending Chapter 11 Reorganization proceedings; and, it is further

ORDERED, that the Clerk shall forthwith enter final judgment in accordance therewith.

JOHN T. ELFVIN
U.S.D.J.

Dated: Buffalo, New York
December 31, 1987

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case Number: CIVIL 83-939E

MIKULEC INDUSTRIES, INC.,

Plaintiff,

v.

ICI AMERICAS, INC.,

Defendant.

[ ] *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] *Decision by Court.* This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion for a directed verdict of dismissal is granted, and the Clerk shall enter final judgment dismissing plaintiff's complaint and reply counterclaim; that defendant is entitled to judgment in its favor in its counterclaims I and II in the amount of $10,147.50, with interest thereon from July 20, 1983, and for the return of any of ICI's tanks remaining in MI's possession after the final conclusion of this litigation, which said judgment shall be, in all respects, final,

except that it may not be executed upon and shall not be or amount to a lien or encumbrance upon any of the plaintiff's property, and shall not afford the defendant any priority over other creditors in the plaintiff's pending Chapter 11 Reorganization proceedings; further the Clerk shall forthwith enter final judgment in accordance therewith.

January 5, 1988
Date

EDWARD P. GUETH, JR.
Clerk
(Illegible)
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-83-939E

MIKULEC INDUSTRIES, INC.,

Plaintiff,

vs.

ICI AMERICAS, INC.,

Defendant.

After bitterly fought myriad pretrial motions and on the threshold of trial, the defendant moved for a summary judgment of dismissal of the causes of action alleged against it in this action. Despite the tenability of said motion and because the trial date was imminent and because it was predicted by the plaintiff that the trial would be brief, it seemed to this Court to be more in the best interests of justice to hear the plaintiff's evidence. This was done and on the eighteenth trial day (three or four of which were not full six-hour days) the plaintiff rested. The defendant moved for a directed verdict and this Court reserved decision. This delay of resolution was bottomed on two major considerations. Firstly, this Court had been "sandwiching" this civil trial into whatever niches existed in the matrix of accommodating the mandates of the Speedy Trial Act, 18 U.S.C. §3161 *et seq.*,[1] and wished to make use of four additional available

[1] Counsel for the plaintiff aptly stated the dilemma of civil litigants in today's federal courts. "What the Speedy Trial Act does to those who wish to have a civil case tried is," he said, "a crime."

days for the taking of evidence. Secondly (and interlocked with the first-stated reason), a substantial portion of the plaintiff's presentation in the form of parts of pretrial depositions was deemed received as part of its case merely by designating the pages and lines of the transcripts with counter designations to be made by the defendant of additional parts thereof where were needed to make complete what the plaintiff wished to have adduced.[2] Further, the plaintiff asked that specific exhibits, some not earlier offered and some as to which an objection had been sustained, be admitted into evidence as part of its case.

The plaintiff rested July 22, 1986 and, because the abovenoted trial time was available, the defendant was required to present a portion of its case on that day and the three next successive days. Oral argument on the defendant's motion to dismiss was had August 1st and the same was deemed submitted. Actual and meaningful submission had to await the results of this Court's "wrestling" with the problem of what was and what was not in evidence and such process, admittedly, consumed much more time than it would have had the rulings been accomplished with the jury standing by and ready to proceed.

The gravamen of the plaintiff's complaint against the defendant is that the plaintiff had a contract with the United States Air Force for the supply of fire extinguishers wherein the fire-fighting substance was halon 1211 ("halon"), that the plaintiff was bound to supply the halon with a moisture content of not more than 200 parts per million ("ppm"), that the plaintiff bought such halon from the defendant, that certain of

[2] Also, the defendant was to have an opportunity to renew objections made at the times of the depositions and to advance objections other than as to the form of the questions.

the plaintiff's extinguishers due to internal corrusion malfunctioned in the field, that the plaintiff's contract was cancelled because the plaintiff was unable to alleviate the problem, that the government threshold of 200 ppm was unrealistically high, that the defendant knew that such was the case and that the defendant through lax controls or an absence of controls supplied halon to the plaintiff which met the Air Force's threshold requirements but which nevertheless contained an excess of water which caused the corrosion and the plaintiff's resultant loss of its contract.

Because, after construing all of the evidence adduced by the plaintiff most favorably to the plaintiff, the whole of the oral testimony and other evidence and all inferences which the trial jury could reasonably draw therefrom is insufficient to support a verdict for the plaintiff and because no reasonable man and no reasonable woman could find for the plaintiff without wholesale resort to sympathy or prejudice or other emotion, the defendant's motion will be granted.

Accordingly it is hereby ORDERED that the defendant's motion for a directed verdict of dismissal is granted and that the defendant may have a judgment in accordance herewith.

Dated: Buffalo, N. Y.
December 30, 1986

JOHN T. ELFVIN
U.S.D.J.

APPENDIX E

Text of Constitution, Statutes, Rules and MilSpec Provisions Involved

UNITED STATES CONSTITUTION

AMENDED ARTICLE V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

AMENDED ARTICLE VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

ARTICLE XIV

Section 1. ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

FEDERAL RULES OF CIVIL PROCEDURE

Rule 26. "General Provisions Governing Discovery"

* * *

"(e) **Supplementation of Responses.**" A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

* * *

"(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment."

* * *

(g) "**Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name. . . . The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules . . . (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; . . . .

* * *

"If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection

is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."

Rule 37. "Failure to Make or Cooperate in Discovery: Sanctions"

* * *

(b) "Failure to Comply with Order.

* * *

(2) "*Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

> "(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> "(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> "(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . ."

* * *

Rule 42. "Consolidation; Separate Trials"

* * *

"**(b) Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

Rule 801. Definitions

"The following definitions apply under this article:

* * *

"**(d) Statements which are not hearsay.** A statement is not hearsay if—

* * *

"**(2) Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, . . ."

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

"(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or (illegible) or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. . . ."

TITLE 15 U.S. CODE COMMERCE AND TRADE SHERMAN ANTI-TRUST ACT

AN ACT to protect trade and commerce against unlawful restraints and monopolies.

Section 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

* * *

Sec. 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

* * *

TITLE 44 U.S. CODE
"PUBLIC CONTRACTS"

("Buy American Act")

§10a. American materials required for public use

"Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. . . ."

§10b. "Contracts for public works; specification for use of American materials; blacklisting contractors violating requirements

"(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. . . ."

§10c. "Definition of terms used in sections 10a to 10c

"When used in sections 10a to 10c of this title—

(a) The term "United States", when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms "public use", "public building", and "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands."

U.S. Air Force Milspecs for Halon 1211

MIL-B-38741 (USAF)
30 July 1965

MILITARY SPECIFICATION

BROMOCHLORODIFLUOROMETHANE, TECHNICAL

1. SCOPE

1.1 This specification covers the requirements for bromochlorodifluoromethane for use as a fire extinguishing agent.

2. APPLICABLE DOCUMENTS

2.1 The following standards of the issue in effect on date of invitation for bids form a part of this specification to the extent specified herein:

STANDARDS

Federal

Federal Test Method Standard No. 791	Lubricants, Liquid Fuels and Related Products; Methods of Testing;

Military

MIL-STD-101	Color Code for Pipelines and for Compressed Gas Cylinders
MIL-STD-105	Sampling Procedures and Tables for Inspection by Attributes
MIL-STD-129	Markings for Shipment and Storage

* * *

3. REQUIREMENTS

3.1 Material. The material shall be a technically pure grade of bromochlorodifluoromethane, suitable as a fire extinguishing fluid and shall conform to the requirements of Table I.

TABLE I—Requirements for Bromochlorodifluoromethane

Property	Requirement	Test Par.
Bromochlorodifluoromethane percent by volume, minimum	99.0	4.4.1
Boiling Point, degrees Centigrade at 760 mm HG	-4±1 (24.8±1.8°F)	4.4.7
Acid Halides & Free Halogens, ppm (by weight), maximum	3.0	4.4.2 and 4.4.3
Nonvolatile Residue, grams/100 ml, maximum	0.02	4.4.4
Suspended Matter or Sediment	None	4.4.5
Color (Platimum-Cobalt Color Standard)	Equal or Less Than #15	4.4.6
Moisture, percent by weight, maximum	0.02*	4.4.8

4. QUALITY ASSURANCE PROVISIONS

4.1 Responsibility for Inspection. Unless otherwise specified in the contract or purchase order, the supplier is responsible for the performance of all inspection requirements as specified herein. Except as otherwise specified, the supplier may utilize his own or any other inspection facilities and services acceptable to the Government. The Government reserves the right to perform any of the inspections set forth in the specification where such inspections are deemed necessary to assure supplies and services conform to proscribed requirements.

---

* Note by Petitioner: 0.02% = 200 ppm.

4.1.1 Inspection shall be in accordance with Method 9601 of Federal Test Method Standard No. 791.

4.2 Sampling for Lot Acceptance.

4.2.1 Inspection Lot. Bromochlorodifluoromethane manufactured as one batch and offered for delivery at one time shall be considered a lot for purposes of inspection.

4.2.2 Sampling for Inspection. A random sample of filled containers shall be selected in accordance with Standard MIL-STD-105 at inspection level I and acceptable quality level (AQL) of 2.5 percent defective to verify compliance with this specification in regards to fill, closure, marking and other requirements not involving tests.

4.2.3 Sampling for Tests. From each lot of filled containers not less than two containers shall be taken at random for tests described under 4.4. The containers may be returned to the lot after acceptance.

4.3 Examination

4.3.1 Filled Containers and Preparation for Delivery Requirements. Each sample selected in accordance with 4.2.2 shall be visually examined for defects of construction of the containers and closure, for evidence of leakage, for unsatisfactory markings and all other preparation for delivery requirements of Section 5. Each sample filled container shall also be weighed to determine the amount of contents. Any container in the sample having one or more defects, or under the required fill, shall be rejected, and if the number of defective containers exceeds the acceptance number for the appropriate sampling plan of Standard MIL-STD-108, the lot represented by the sample shall be rejected. Rejected lots may be resubmitted for acceptance, provided contractor has removed or recorded all nonconforming products.

4.4 Test. Test shall be conducted as specified herein.

* * *

4.4.8 Moisture. Analysis shall be in accordance with Federal Test Method 791, Method 3283.

4.5 Rejection. Failure of any container to conform to the requirements of this specification shall be cause for rejection of the entire lot.

5. PREPARATION FOR DELIVERY

5.1 Packaging.

5.1.1 Levels A and C. Unless otherwise specified, bromochlorodifluoromethane shall be delivered in cylinders of (illegible) and 200-pound capacity conforming to Interstate Commerce Commission specification ICC 48300 or ICC 4BA300, and in 2600-pound tanks conforming to Interstate Commerce Commission Specifications ICC 1061500 or ICC 110A500W. The contractor shall assure that containers are free from contamination and are suitable for shipment and storage.

5.2 Marking. In addition to any special marking required by the contract or order, containers shall be marked in accordance with Military Standard MIL-STD-129. Filled cylinders shall be color coded in accordance with MIL-STD-101.

6. NOTES

6.1 Intended Use. The bromochlorodifluoromethane covered by this specification is intended for use as a fire extinguishing agent.

* * *

MIL-B-38741 (USAF)
Amendment 1
25 September 1974

MILITARY SPECIFICATION

BROMOCHLORODIFLUOROMETHANE, TECHNICAL

This amendment forms a part of Military Specification MIL-B-38741(USAF) dated 30 Jul 1965 and is approved for use by all Departments and Agencies of the Department of Defense.

* * *

Page 8, paragraph 5.1.1; Delete and substitute:

5.1.1 Levels A and C. Unless otherwise specified, bromochlorodifluoromethane shall be delivered in cylinders conforming to specifications DOT 48300 or 4BA300, or in one ton tanks conforming to specifications DOT 1061500 or 110A500. Unless otherwise specified (6.2), cylinders shall be equipped with Dual Port Fluorocarbon Valve ICI/GC 333019A, or equal. The contractor shall assure that containers are free from contamination and are suitable for shipment and storage.

MIL-B-3874(USAF)
Amendment 2
9 April 1984
Superseding
Amendment 1
25 September 1974

MILITARY SPECIFICATION

BROMOCHLORODIFLUOROMETHANE, TECHNICAL

This amendment forms a part of Military Specification MIL-B-38741(USAF), dated 30 July 1965 and is approved for use by all Departments and Agencies of the Department of Defense.

* * *

PAGE 3

* TABLE 1, Line 15: Delete and substitute:

"Moisture, percent by weight,
maximum 0.002 4.4.8"

PAGE 8

* 4.4.8: Delete and substitute "4.4.8 *Moisture.* The analysis may be conducted by the phosphorus pentoxide method, by infrared absorption, by an electrolytic moisture analysis, or by a piezoelectric analyzer. The accuracy of the results and the standard method shall be by orthodox Karl Fischer method of ASTM E 700."

APPENDIX F

Excerpts of Trial Exhibit

Plaintiff's Exhibit P-36A

Excerpt from ICI Lab Book, Ex. P-36)
(ICI's tests to compare ICI's proprietary moisture test to the USAF MilSpecs ("US") moisture test on the same sample of Halon 1211)

ICI Americas, Inc.
Wilmington, Delaware 19897

G.C. U.S.

Moisture ICI

$$H_2O = \frac{[(2.38 \times 2.9) - 6.25]\ 1465}{959\text{-}790} = 5.7 \text{ ppm}$$

Moisture US

$$H_2O = \frac{[(.69 \times 4.4) - 0]\ 5693}{150 \text{ ml} \times 1.850} = 62 \text{ ppm}$$

APPENDIX G

Excerpts of Trial Testimony

Excerpts of trial testimony of
Werner Horlbeck, ICI's Plant Manager

(Joint Appendix, Vol. II, pp. 1013-1014)

Q. "Would it be something you wouldn't sell ordinarily?

A. "Or what you may *not* sell to one customer which you *would* sell to *another* customer.

Q. "I see. So you have a list of *preferred customers* and *other* customers?

A. "We have customers for whom which characteristics have been established. We have *customers like the Air Force* who have a *two hundred parts per million* water spec. *other* customers who have thirty or forty part per million water spec.

Q. "What category did you put Mr. Mikulec in?

A. "Mr. Mikulec was being supplied material in conformance with the Air Force contracts.

* * *

Q. "I didn't ask you that. I said, did you put Mr. Mikulec in the thirty parts per million category of customer?

* * *

THE COURT: "Excuse me. Can you answer that yes or no?

THE WITNESS: "Yes, I can, sir. *Two hundred parts per million.*"